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No. 95-1793

In The

Supreme Court of the United States

October Term, 1995

JAMES E. STILTNER,

Petitioner,

vs.

BERETTA U.S.A. CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fourth Circuit correctly hold that an employer did not discriminate against a participant in violation of § 510 of ERISA when it advised the participant, in the context of an offer to settle a claim for disability benefits, that it intended to cease providing gratuitously supplied health care benefits to which the participant admittedly had no right under the terms of any ERISA plan or otherwise?

PARTIES TO THE PROCEEDING

Petitioner has correctly identified the parties. Beretta U.S.A. Corp. is a wholly owned subsidiary of an Italian parent company, "Pietro Beretta S.P.A."

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STATEMENT OF THE CASE

On November 21, 1988, Respondent, Beretta U.S.A. Corp. ("Beretta"), hired Petitioner, James E. Stiltner, who was then unemployed, as an independent contractor. Mr. Stiltner was not promised and did not receive any disability coverage. Beretta paid Mr. Stiltner an amount sufficient for him to obtain COBRA health coverage from his prior employer.

On March 1, 1989, Beretta made Mr. Stiltner a payroll employee. Mr. Stiltner enrolled in Beretta's employee benefit plans, which provided, *inter alia*, health benefits and disability insurance. Beretta's health plan only entitles full-time employees and their families to benefits.[1]

Mr. Stiltner became totally and permanently disabled by June, 1990. (Complaint at ¶ 17) Though it knew Mr. Stiltner would never return to work, Beretta kept providing him with health benefits for over two years while he (with Beretta's active support) pursued a claim for disability benefits.[2]

Mr. Stiltner concedes that Beretta's payment of his health care expenses during that time was entirely gratuitous. (21a). Beretta had no obligation to provide health care coverage to Mr. Stiltner under the terms of any ERISA plan or otherwise, and had never before gratuitously provided health benefits to someone in Mr. Stiltner's position. (Gannon Affidavit at ¶ 6).

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1. Beretta self-insures its health plan, but purchases stop-loss insurance to cover extraordinary claims. *See* Affidavit of Catherine G. Gannon (Beretta's former Benefits Administrator), dated February 23, 1993 (hereinafter "Gannon Affidavit"), at ¶ 8.

2. Beretta also continued paying Mr. Stiltner a salary through October, 1990 in a voluntary effort to help him through the waiting period before disability benefits could commence. (Gannon Affidavit at ¶ 4)

In October, 1992, after the disability plan insurer finally denied his claim for disability benefits, Mr. Stiltner, through one of his attorneys, demanded that Beretta pay him disability benefits in excess of $330,000.[3] Beretta submitted a counter-offer to Mr. Stiltner's lawyer, the terms of which included an additional 18 months of health care coverage. The counter-offer also advised that, unless the parties reached an agreement, Beretta would terminate those benefits.[4] An agreement was not forthcoming.

In the meantime, although Mr. Stiltner had been unsuccessful in his claim for benefits from the disability insurer, he did receive social security disability benefits effective as of August, 1990,[5] and became entitled to Medicare coverage twenty five months later. *See* 42 U.S.C. § 426(b) (1991).

Mr. Stiltner filed suit against Beretta for disability benefits and other damages, asserting both ERISA and state common law contract and tort claims. (Complaint at ¶¶ 24-40).[6] Mr. Stiltner

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3. October 30, 1992 letter from Roland P. Wilder, Jr. (Mr. Stiltner's third attorney) to Jeffrey K. Reh (Beretta's General Counsel).

4. November 23, 1992 letter from Jeffrey K. Reh to Roland P. Wilder. Despite stating in this letter that it no longer intended to give Mr. Stiltner gratuitous health care benefits, Beretta continued to provide those benefits through March 1, 1993, when the District Court ruled it could lawfully terminate them. *See* March 1, 1993 letter from Catherine Gannon to Mr. Stiltner.

5. *See* Deposition of James E. Stiltner, dated June 7, 1993 (hereinafter "Stiltner Depo.") at 76-77; August 13, 1991 letter from Commissioner of Social Security to Mr. Stiltner.

6. The gravamen of Mr. Stiltner's ERISA claim for disability benefits (Cont'd)

also claimed that Beretta's decision to stop providing him with health care benefits violated § 510 of ERISA. (Complaint at ¶ 36). In seeking injunctive relief, Mr. Stiltner alleged that Beretta had a pattern or practice of providing such health care coverage to other similarly situated employees. (Complaint at ¶ 34).[7] Later, when the evidence conclusively demonstrated that this assertion was not true, Mr. Stiltner conceded that Beretta had been wholly gratuitous in paying for his health care. (21a, 91a).[8]

The District Court granted summary judgment in favor of Beretta on all counts. *Stiltner v. Beretta U.S.A. Corp.*, 844 F. Supp. 242 (D. Md. 1994). The Court of Appeals for the Fourth Circuit (the "Court of Appeals") unanimously affirmed except with respect to the § 510 claim. (39a).

Beretta filed a suggestion for rehearing *en banc*, which the Court of Appeals granted. Upon rehearing, the *en banc* Court of Appeals affirmed the District Court's entry of summary judgment on all counts. (1a). Judge Hamilton, after reviewing the legislative history and policies of ERISA, found it "nothing short of startling" that Congress could have intended to "punish"

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was his purported reliance on a summary plan description ("SPD") that did not advise him of a longer waiting period for coverage of preexisting conditions. Not only had that SPD been superseded, but Mr. Stiltner did not even see it until *after* he became disabled. (Stiltner Depo. at 56-57, 81-82).

7. *See also* Declaration of James E. Stiltner In Support Of Plaintiff's Motion For Temporary And Preliminary Injunctive Relief at ¶ 10.

8. In his statement of the case, Mr. Stiltner asserts that Beretta provides health care benefits to disabled employees while they pursue claims for disability benefits. In fact, Beretta has no practice or policy of continuing to provide health care benefits to a permanently disabled employee. (Gannon Affidavit at ¶ 6).

Beretta for refusing to continue providing health insurance benefits to Mr. Stiltner "when it unquestionably had no duty to do so." (21a).

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY HELD THAT AN EMPLOYER'S WITHDRAWAL OF UNPRECEDENTED, GRATUITOUS BENEFITS IS NOT ACTIONABLE "DISCRIMINATION" UNDER ERISA § 510.

Beretta treated Mr. Stiltner more favorably than any other employee by gratuitously providing him with health care benefits for over two years after he stopped working and lost his entitlement to those benefits. Mr. Stiltner would make Beretta's decision to discontinue that unprecedented gift unlawful, arguing that § 510 prohibits *any* adverse action taken in response to the exercise of ERISA rights. Mr. Stiltner's construction of § 510 ignores its history, language and structure, and would create harmful public policy. The Court of Appeals properly rejected that construction.

A. The History, Language And Structure Of § 510 Support The Court Of Appeals Decision.

Mr. Stiltner urged the Court of Appeals to interpret ERISA § 510 in accordance with Section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3) (1973),[9] because

9. *See* Appellant's Brief (Case No. 94-1323), dated April 20, 1994, at 41-43. Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1973).

Congress patterned § 510 after that statute. The Court of Appeals, after examining § 510's legislative history,[10] agreed with Mr. Stiltner, but correctly held that § 510, like NLRA Section 8(a)(3), does not prohibit employers from withdrawing mere gratuities. (17-18a); *see N.L.R.B. v. Electro Vector, Inc.*, 539 F.2d 35, 37 (9th Cir. 1976) ("a bonus which is considered a 'gift' can be withheld by the employer at will . . ." without violating the NLRA), *cert. denied*, 434 U.S. 821 (1977). Mr. Stiltner now changes his position, arguing that the Court of Appeals erred in considering analogous NLRA cases. (Petition at 11-13).

Mr. Stiltner's unbounded interpretation of § 510 would prohibit virtually *any* action that adversely affects a benefits claimant, provided the claimant can allege improper motive. (Petition at 9-10). But the language and structure of § 510 restrict its application to specific conduct that impacts employment and/or union relationships.[11] The withdrawal of an unprecedented

10. *See* 119 Cong. Rec. 30374, *reprinted in* Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (Comm. Print 1976), at 1774-75 (statement of Sen. Hartke) ("The language [of ERISA § 510] parallels section 8(a)(3) of the National Labor Relations Act. . . ."); *see also Young v. Standard Oil*, 660 F. Supp. 587, 597 (S.D. Ind. 1987) (§ 510 "is modeled upon § 8(a)(3) of the National Labor Relations Act . . ."), *aff'd*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988); *West v. Butler*, 621 F.2d 240, 245 & n.4 (6th Cir. 1980).

11. Indeed, the cases Mr. Stiltner cites to support his assertion that § 510 prohibits "any 'economic sanction' or 'violence' that would coerce a participant or beneficiary . . ." each involved conduct that seriously affected employment or union relationships. *See Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir. 1989) (employee *discharged* in response to wife's claim for benefits); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.) (plaintiffs were victims of discriminatory *layoff*), *cert. denied*, 484 U.S. 979 (1987); *McGinnis v. Joyce*, 507 F. Supp. 654 (N.D. Ill. 1981) (union threatened plaintiff with *violence*).

gift does not affect those relationships, and does not violate § 510.

ERISA § 510 makes it unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against participants or beneficiaries to defeat ERISA rights. Mr. Stiltner concedes that five of these prohibited actions have no application to his dispute with Beretta. Rather, he claims that Beretta "discriminated against" him by withdrawing the unprecedented gratuity.

In § 510, the term "discriminate against" immediately follows five specifically prohibited actions that affect employment or union relations. Accordingly, Congress must have intended to limit the term "discriminate against" to other conduct that affects employment or union relations. *See Hilton v. Southwestern Bell Tel. Co.*, 936 F.2d 823, 828 (5th Cir. 1991) ("When general words follow an enumeration of persons or things, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned"), *cert. denied*, 502 U.S. 1048 (1992); *Accord* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.19 at 202-03 (5th ed. 1992).[12]

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12. Notably, Congress chose not to follow the wording of the civil-rights-based statutes upon which Mr. Stiltner now relies to support his novel interpretation of § 510. (Petition at 8-9 & n.8) Unlike § 510, those statutes do not specifically list prohibited acts, but use the general term "discriminate" in its broadest sense. Thus, § 510 is narrower in focus — not broader — than those statutes. *See Hilton*, 936 F.2d at 828; *Sutherland Statutory Construction* § 47.19 at 202-03.

Moreover, Mr. Stiltner relies upon *Cohen v. S.U.P.A., Inc.*, 814 F. Supp. (Cont'd)

If, as Mr. Stiltner argues, the term "discriminate against" encompasses *any adverse action*, the five specifically listed terms that precede it in the statute (discharge, fine, suspend, expel and discipline) are mere surplusage, completely subsumed within the broad concept of discrimination. The Court should not presume that Congress intended to enact meaningless language. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty 'to give effect, if possible, to every clause and word of a statute'") (citations omitted); *Union Pacific Corp. v. United States*, 5 F.3d 523, 526 (Fed. Cir. 1993) ("The meaning of statutory terms should not render other words and phrases within the statute superfluous").

Congress crafted § 510 to prohibit certain specifically listed acts that affect employment or union relations. Thus, in enacting § 510, Congress sought to protect the employment and union relationships that give rise to benefits. Beretta's withdrawal of the gratuity did not in any way affect Mr. Stiltner's employment relation. Indeed, Mr. Stiltner completely stopped working for Beretta more than two years *before* Beretta discontinued the gift.

The courts have construed § 510 to prohibit only conduct that impairs employment relations. *See West*, 621 F.2d at 245-46 ("discrimination, to violate § 510, must affect the individual's employment relationship in some substantial way"); *Haberern*

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251 (N.D.N.Y. 1993), for the proposition that withdrawal of gratuitous health benefits may violate the Age Discrimination in Employment Act ("ADEA"). (Petition at 9). *Cohen* did not involve gratuitous benefits. Rather, during the course of plaintiff's employment, defendants promised to extend his health benefits until age 65. (814 F. Supp. at 253). By continuing to work for the defendants, plaintiff furnished consideration for the promise, which became a binding term or condition of plaintiff's employment.

v. Kaupp Vascular Surgeons Pension Plan, 24 F.3d 1491, 1503 (3d Cir. 1994) (term "discriminate" in ERISA § 510 is "limited to actions affecting the employer-employee relationship"), *cert. denied*, 115 S. Ct. 1099, 130 L. Ed. 2d 1067 (1995); *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 667-69 (7th Cir. 1993) (same); *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990) (same); *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1327 (9th Cir. 1992) (§ 510 discrimination requires constructive discharge), *cert. denied*, 507 U.S. 1031 (1993). Mr. Stiltner has not cited, and Beretta is not aware of, any contrary appellate authorities.

Even the *en banc* dissent finds these cases persuasive, but would limit their application to § 510 "attainment" cases — those in which the employer has sought to prevent the plaintiff from receiving a particular benefit. (32-33a). Thus, in "attainment" cases, the dissent would interpret the term "discriminate against" to reach only conduct that affects employment relations. But in § 510 "retaliation" cases — those in which the plaintiff alleges that the employer acted in response to an exercise of ERISA rights — the dissent would construe the *same* term (used only once in § 510) to outlaw *any adverse action*. (28-29a). This bifurcated construction ascribes conflicting meanings to the identical term in the same statute, and thus violates another fundamental rule of statutory construction. *Cf. Allen v. CSX Transp., Inc.*, 22 F.3d 1180, 1182 (D.C. Cir. 1994) (Even when the same term is used *more* than once in a statute "[i]t is a well established rule of statutory construction that 'a word is presumed to have the same meaning in all subsections of the same statute' ") (quoting *Morrison-Knudson Constr. Co. v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor*, 461 U.S. 624, 633 (1983)).[13] The *en banc* majority properly rejected this

13. Moreover, this strained, result-oriented interpretation illustrates the lengths to which Mr. Stiltner must go to make § 510 fit a situation it was never meant to address.

construction and followed the wealth of established precedent from other circuits.

Thus, the Court of Appeals correctly concluded that Beretta's conduct cannot form the basis for a § 510 claim.

B. The Court Of Appeals Decision Encourages Employers To Help Needy Employees.

The narrow holding of the Court of Appeals — that the withdrawal of gratuitously provided benefits is not actionable "discrimination" under § 510 — benefits employers and employees alike and, in the process, furthers an important public interest. The holding assures employers that ungrateful employees will not be able to convert gratuitously provided benefits into *de facto* entitlements by simply asserting unrelated ERISA claims.[14] As a result, employers and unions will be less hesitant to help needy employees and their families. *See Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 79 (3d Cir. 1991) ("Employers are understandably more willing to provide employee benefits when they can reserve the right to decrease or eliminate those benefits"), *cert. denied*, 503 U.S. 938 (1992).

14. Under Mr. Stiltner's construction of § 510, an employer would, as a practical matter, have to continue providing gratuitous benefits indefinitely once the recipient makes an unrelated ERISA claim. Otherwise, the employer would face a § 510 claim challenging its motive in terminating the gift. And if such a claim should succeed, the court might convert the gratuity into an entitlement and award attorney fees.

Moreover, even if the employer continued the gratuitous benefit until after the employee's unrelated ERISA claim was finally adjudicated, it could not thereafter terminate the gratuity without fear of litigation. The participant could simply claim that the employer decided to terminate the gift because of the employee's *former* ERISA claim.

An employer and/or a union should remain free to provide benefits to a participant or beneficiary beyond those required by the terms of its plan, without having to fear expensive ERISA litigation. A contrary holding would directly disadvantage participants and beneficiaries by discouraging employer charity. *See Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58 (4th Cir. 1992) (recognizing that requiring plan insurers to give advance notice of termination for non-payment of premiums would ultimately "inure to the detriment of beneficiaries" because it would discourage insurers from treating policies as if they were unexpired in individual cases), *cert. denied*, 506 U.S. 1081 (1993). Indeed, no rational employer would have provided Mr. Stiltner with over two years of expensive, gratuitous medical benefits if it knew he could eventually challenge and perhaps block the decision to halt those benefits.

C. The Court Of Appeals Holding Is Narrow In Scope, And Will Not Discourage Enforcement Of § 510.

Mr. Stiltner misconstrues the scope of the Court of Appeals holding. The Court of Appeals expressly did *not* hold that employers may with impunity terminate all benefits they are "not contractually obliged to continue," (Petition at 6), but limited its holding to uncommonly-provided, non-contractual benefits that are not covered by any formal employer policy. Moreover, this narrow holding does not apply if the employer has used the benefit as an inducement to employees. (21a). Finally, the Court of Appeals recognized that "a benefit that was originally provided gratuitously may develop into a nongratuitous benefit." (21a). Thus, if an employer has a policy or practice of providing a particular gratuitous benefit, its decision to withdraw that benefit could be actionable under § 510.

But in the instant case it is undisputed that Beretta never provided health benefits to any other person in Mr. Stiltner's

position.[15] Moreover, Mr. Stiltner "concedes that Beretta's payment of his health insurance premiums after he ceased working amounted to a gratuitous benefit." (21a). Only in rare cases will the gratuitous nature of the benefit be so clear cut.

Nevertheless, Mr. Stiltner asserts that the Court of Appeals "decision threatens effective private enforcement of [§ 510]." (Petition at 14). To support his dramatic assessment, Mr. Stiltner asserts that many employers provide "discretionary" health benefits, and "a historic interplay [exists] between disability or retirement benefits and discretionary employer-provided health benefits." Notably, Mr. Stiltner offers absolutely no support for either assertion. In any event, the Court of Appeals decision makes clear that employers that have a policy or practice of providing health benefits to disabled or retired employees may not withdraw those benefits with impunity. (21a).

Thus, the narrow Court of Appeals holding will likely affect few cases and does not in any way "threaten effective private enforcement of [§ 510]."

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15. Beretta believes that § 510 discrimination requires a finding of disparate treatment. *See Rush v. McDonald's Corp.*, 966 F.2d 1104, 1120 n. 58 (7th Cir. 1992) ("ERISA does not require an employer to give any benefits at all to its employees. [Section 510] instead provides that, once the decision is made to afford benefits, like situated employees must be treated in similar fashion"). The *en banc* Court of Appeals did not address this argument, however, as it was not essential to the Court's decision that Beretta had treated Mr. Stiltner *more* favorably than any previous or subsequent disabled employee.

CONCLUSION

The Court should deny Mr. Stiltner's petition for a writ of certiorari.

Respectfully submitted,

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